FILE COPY

MAY 21 19
CHARLES ELMORE

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1933

No. [redacted] 54

E. FORREST MITCHELL, Insurance Commissioner of the State of California,
Petitioner,

vs.

BERTHA E. MAURER and INTERNATIONAL RE-INSURANCE CORPORATION (a corporation),
Respondents.

PETITION FOR WRIT OF CERTIORARI,
to the United States Circuit Court of Appeals
for the Ninth Circuit,
and
BRIEF IN SUPPORT THEREOF.

FRANK L. GUERENA,
Mills Tower, San Francisco,
Attorney for Petitioner.

Subject Index

	Page
Petition for writ of certiorari	1
Summary statement of the matter involved	1
Reasons relied on for the allowance of the writ	3
Prayer for writ	4
Brief in support of petition for writ of certiorari	5
I. The decisions of the courts below	5
II. Jurisdiction	6
III. Statement of the case	6
IV. Specification of errors	9
V. Argument	10
The District Court did not obtain jurisdiction by the prior filing therein of the original bill because that bill did not state facts sufficient to plead a cause of action or to confer jurisdiction	10
(1) The "complainant" in the bill	10
(2) The "petitioners" in the bill	11
(3) The bill generally	11
The amendments filed in the District Court on April 25, 1933, were not effective as of April 19, 1933, the date when the original bill was therein filed	18
Conclusion	23

Table of Authorities Cited

Cases	Page
American Bonding and Trust Co. v. Gibson County, 145 Fed. 871, 874	19
Arkansas Life Ins. Co. v. American Natl. Life Ins. Co., 161 S. W. 136	22
Armstrong Cork Co. v. Merchants' Refrigerating Co., 184 Fed. 199	20
Bluefields S. S. Co. v. Steele, 184 Fed. 584	15

Pages

Casualty Co. of America, In re, 155 N. E. 735, 244 N. Y. 443 13
Columbia Valley R. Co. v. Portland & S. Ry. Co., 162 F. 603 19
Davis v. Muscogee Mfg. Co., 32 S. E. 30..... 22
Fleischmann Co. v. United States, 270 U. S. 349..... 18
Goodwin v. Robinson, 30 Ark. 536..... 23
Harkin v. Brundage, 276 U. S. 36, 43-44.....10, 14
Hoover Co. v. Sesquicentennial Exhibition Assn., 26 Fed. (2d) 821 20
Hynes v. Evans, 105 S. E. 59..... 22
Iberville Trust & Savings Bank v. City Cafe, 150 So. 95.. 22
Illinois Surety Co. v. Peeler, 240 U. S. 214..... 19
Lay v. Mitchell, 283 U. S. 864..... 13
McCormick v. Kennedy, 56 S. W. (2d) 213..... 23
Mitchell v. Maurer, 69 Fed. (2d) 233..... 5
People v. Marquette Natl. Fire Ins. Co., 184 N. E. 800, 808 13
Pusey & Jones v. Hansen, 261 U. S. 491..... 17
Shephard v. So. Pine Co. of Ga., 45 S. E. 220..... 22
State v. Hackly, 50 So. 772..... 20
Terzia v. The Grand Leader, 145 So. 363, 366.....21, 22
Texas Cement Co. v. McCord, 233 U. S. 157..... 19
Tremont Lbr. Co. v. May, 78 So. 650.....21, 22
Turner v. Plottel, 166 S. E. 31..... 22

Statutes

Corpus Juris., Vol. 1, Sec. 413, p. 1159..... 21
Deering's General Laws of Calif., Act 3739..... 13
Judicial Code, Sec. 240 (a)..... 6
Revised Code of Delaware for 1915, Sec. 3883..... 17
Statutes of Calif. for 1919, p. 265..... 13
Statutes of Calif. for 1921, p. 1017..... 13
Statutes of Calif. for 1931, p. 2375..... 13
U. S. C. A., Vol. 28, Sec. 347..... 6

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1933

No.

E. FORREST MITCHELL, Insurance Commissioner of the State of California,
Petitioner,

vs.

BERTHA E. MAURER and INTERNATIONAL RE-INSURANCE CORPORATION (a corporation),
Respondents.

PETITION FOR WRIT OF CERTIORARI,
to the United States Circuit Court of Appeals
for the Ninth Circuit.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

A.

SUMMARY STATEMENT OF MATTER INVOLVED.

The question involved is whether the Federal Court in California or the California State Court first ac-

quired jurisdiction to liquidate and wind up the California business and affairs of appellee International Re-Insurance Corporation, a Delaware company.

Primary receivers were appointed by the State Court of Delaware on April 19, 1933. Appellee Bertha E. Maurer was named complainant and the primary receivers were the petitioners in a bill of complaint filed on the same day against appellee corporation in the United States District Court for the Southern District of California praying that ancillary receivers be appointed to take possession of all property of the company in California and preserve the same until the further order of that Court.

Nine minutes later on the same day appellant E. Forrest Mitchell, as Insurance Commissioner of California, filed in the Superior Court of California a petition alleging the hazardous financial condition of the company and requesting that he be appointed as statutory liquidator, with the powers and duties of an ancillary receiver, pursuant to the direction of the State law affecting the liquidation of insurance companies.

In the District Court and in the Appellate Court appellant contended that the original bill filed in the District Court was so lacking in indispensable jurisdictional averments as to be a legal nullity not conferring upon that Court jurisdiction as a Federal Court or as a Court of Equity, and that, in consequence, the State's proceeding was first instituted and jurisdiction was first acquired by the State Court.

The Appellate Court disposed of that contention by reading into the original bill filed in the District

Court amendments filed on April 25, 1933, holding the bill as amended sufficient to confer jurisdiction upon the District Court, and giving the amendments effect as of the date of the filing of the original bill in the District Court. Opinion upon the alleged insufficiency of the original bill was expressly reserved, and evidently was deemed unnecessary to the decision.

Upon petition for rehearing appellant urged that it was necessary for the Appellate Court to pass upon the original bill in order to determine whether it was a sufficient bill to which the doctrine of relating back the amendments could properly be applied. That petition was denied without opinion.

Therefore a review by this Court is sought.

B.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The original bill of complaint filed in the District Court was a legal nullity, and no bill stating a cause of action or conferring jurisdiction was on file in the Federal Court when the State of California, through the appellant, initiated its proceeding in the State Court on April 19, 1933.

2. The amendments filed in the District Court on April 25, 1933, could not relate back to the time the original bill was filed because the original bill did not state a cause of action or confer jurisdiction, hence there was nothing to amend.

3. The State Court first acquired jurisdiction through the prior filing therein of a petition for the

appointment of appellant as statutory liquidator stating cause for that appointment and therefore conferring jurisdiction upon that Court.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 7262, E. Forrest Mitchell, Insurance Commissioner of the State of California, Intervenor and Appellant, v. Bertha E. Maurer, Complainant and Appellee, International Re-Insurance Corporation, a corporation, Respondent and Appellee, and that the said decree of said Court may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Dated, San Francisco, California,
May 14, 1934.

E. FORREST MITCHELL,
Insurance Commissioner of the State of California,
Petitioner.

FRANK L. GUERENA,
Attorney for Petitioner.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1933

No.

E. FORREST MITCHELL, Insurance Commissioner of the State of California,
Petitioner,

vs.

BERTHA E. MAURER and INTERNATIONAL RE-INSURANCE CORPORATION (a corporation),
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE DECISIONS OF THE COURTS BELOW.

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit is reported in 69 Fed. (2d) 233. It is set forth on pages 97-133 of the Transcript of Record.

The orders of the District Court from which appeal was taken were made and entered on May 12, 1933 (T. p. 51) and on June 13, 1933. (T. p. 69.)

The opinion of the Appellate Court was rendered and filed on February 26, 1934 (T. p. 133) and appellant's petition for a rehearing by that Court was denied by order made and filed on April 13, 1934. (T. p. 135.)

II.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, 28 U. S. C. A., Sec. 347.

III.

STATEMENT OF THE CASE.

Appellee corporation was organized under the laws of Delaware and was authorized to write workmen's compensation and other classes of insurance in California. On March 30, 1933, appellant suspended the right of that corporation to transact the business of workmen's compensation insurance in California, and that suspension order was not withdrawn. (T. p. 85.)

On April 19, 1933, at 4:45 P. M. a bill of complaint naming appellee Bertha E. Maurer as complainant and naming appellee corporation as respondent was filed in the United States District Court for the Southern District of California alleging that on the same day primary receivers for said corporation had been appointed by order of the Delaware State Court and praying that ancillary receivers be appointed to care for and preserve the property of the corporation in

California pending further order of the Court to which the bill was presented. In that bill the primary receivers appeared in the preamble of the bill and throughout the bill as the petitioners, and the bill was signed by the petitioners and verified in their behalf. The bill was not signed by the complainant. (T. pp. 3-8.)

At an undisclosed hour on April 19, 1933, the District Court signed an order appointing one Keim and one Comstock ancillary co-receivers for appellee corporation. Keim then was and still is one of the three primary receivers. That order also enjoined any interference with the California property of the corporation. The order was filed on April 20, 1933, at 1:50 P. M. (T. pp. 9, 99.)

On April 19, 1933, at 4:54 P. M. appellant filed in the Superior Court of California a petition alleging that appellee corporation was in such condition that the further transaction of business by it in California would be hazardous to its policyholders and creditors, and asking that appellant be appointed to liquidate the California business of the corporation. Upon the filing of that petition the State Court issued a temporary order enjoining the corporation from transacting business or disposing of its property, ordering appellant into the actual possession of the California property and restraining all others from any interference. (T. pp. 86, 98, 99.)

On April 20, 1933, at 9:30 A. M., the temporary restraining order of the State Court, an order to show cause, and appellant's petition were served on appellee corporation. (T. p. 99.)

On April 20, 1933, at an hour subsequent to 9:30 A. M., the order of the District Court was served upon appellee corporation; and on April 21, 1933, that order was served upon appellant. (T. p. 99.)

On April 25, 1933, various amendments were filed to the bill of complaint on file in the District Court (T. pp. 9-39); and on the same date appellee corporation filed its answer to that bill, as amended, admitting all of the allegations thereof and consenting to the appointment of ancillary receivers. (T. pp. 38-39.)

The order to show cause issued by the State Court was returnable on April 28, 1933, but was continued, at appellant's request, in view of the pendency of the proceedings in the District Court. (T. p. 99.)

On May 2, 1933, appellant served and filed in the District Court notice of appellant's motion to vacate the order appointing the ancillary co-receivers, to dissolve the injunction embodied in said order, to dismiss the bill of complaint filed in the District Court, and to re-examine the ex parte order appointing the ancillary co-receivers. (T. p. 45.) That motion was heard and denied by the District Court on May 12, 1933. (T. p. 51.) A motion to rehear said motion was filed by appellant and was entertained and denied by the District Court on June 13, 1933. (T. p. 69.)

Appellant appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the orders on said motions, and the orders were affirmed by the Appellate Court on February 26, 1934. Petition for rehearing was filed by appellant on March

28, 1934, and was denied on April 13, 1934. A stay of the mandate of the Appellate Court was granted pending the filing of this petition for a writ of certiorari. (T. pp. 133-135.)

In the interest of brevity appellant by reference makes part of this statement of the case the "Summary Statement of Matter Involved" in the petition for writ of certiorari presented herewith.

IV.

SPECIFICATION OF ERRORS.

It is claimed by appellant:

1. That the Appellate Court erred in omitting to decide whether the original bill filed in the District Court was a legal nullity, as contended by appellant, or whether it was sufficient to state a cause of action and to confer jurisdiction upon the District Court.

2. That the Appellate Court should have decided that the original bill filed in the District Court was insufficient to state a cause of action or to confer jurisdiction upon that Court as a Federal Court or as a Court of Equity.

3. That the Appellate Court erred in deciding that the amendments filed in the District Court on April 25, 1933, related back to the hour of 4.54 P. M. on April 19, 1933, at which time the original bill was filed.

4. That the Appellate Court erred in deciding that the District Court first acquired jurisdiction through the filing therein of the original bill and the amendments thereto.

V.

ARGUMENT.

THE DISTRICT COURT DID NOT OBTAIN JURISDICTION BY THE PRIOR FILING THEREIN OF THE ORIGINAL BILL BECAUSE THAT BILL DID NOT STATE FACTS SUFFICIENT TO PLEAD A CAUSE OF ACTION OR TO CONFER JURISDICTION.

Examination of the original bill of complaint filed in the District Court reveals not merely technical defects or inartificial pleading but an utter lack of essential jurisdictional averments. The bill set forth no complaint or cause of action of any kind and was a legal nullity which could not operate to confer any jurisdiction upon the District Court.

Appellant therefore contends that the State Court first acquired jurisdiction, within the rule announced by this Court in

Harkin v. Brundage, 276 U. S. 36, 43-44,

through the filing therein of appellant's petition which did state cause for the appointment of appellant as statutory liquidator and did confer jurisdiction upon the State Court.

The original bill of complaint is set forth on pages 3 to 7 of the Transcript of Record. Analysis thereof follows:

(1) The "complainant" in the bill.

In the caption of the bill or petition for appointment of ancillary receivers, appellee Bertha E. Maurer is named as the "complainant", but no reference of any kind is made to her in the body of the bill.

It is not therein disclosed who she was, what was her relation, if any, to appellee corporation or to the

primary receivers characterized as "petitioners" in the bill, whether she was a creditor of appellee corporation and, if so, whether she was a secured or unsecured creditor, or where she resided.

The so-called "complainant" did not sign or verify the bill and did not pray for any relief, nor was the bill signed or verified in her behalf.

(2) The "petitioners" in the bill.

The preamble to the bill describes the bill as the petition of the three primary receivers, but the petitioners are not named as the complainants either in the caption or in the body of the bill. Although the petitioners are not parties to the bill it was the petitioners who prayed for the appointment of ancillary receivers and who expressed their opinion that the appointment of ancillary receivers was "absolutely necessary" for the preservation of the property of appellee corporation and for the protection of its creditors, and it was in their behalf that the bill was signed and verified.

The residence of those petitioners was not pleaded except that it was ascertainable from the verification of the bill that they were not residents of the County of Los Angeles, State of California.

(3) The bill generally.

The bill recites the appointment as primary receivers of the petitioners named therein, but it does not appear whether the appointment was made because of the insolvency of appellee corporation or for some other of the many reasons that may have led to an appointment for general or limited purposes.

The bill did not set forth the nature of the proceeding in which the primary receivers were appointed, expressly stating that the nature of the proceeding would appear to the District Court from an exemplified copy of the bill filed in the Delaware Court which was "being forwarded" to California.

The bill did recite that appellee corporation owned property in California and that certain of its creditors were threatening suits and attachments against that property on overdue obligations, also that appellee corporation would have no valid defense thereto. However, that could not properly be regarded as an allegation of insolvency of appellee corporation or even of an assertion that appellee corporation was in a hazardous financial condition, for those recitals are immediately followed by an allegation that the assets of appellee corporation in Los Angeles were worth about two million dollars "in excess of secured and unsecured debts."

The bill was wholly silent as to the amount in controversy between the "complainant" Bertha E. Maurer and the "respondent" International Re-Insurance Corporation. Indeed, it was not even charged in the bill that there was a controversy between said complainant and said respondent or that said complainant had any complaint or cause of action of any kind against said respondent.

Appellant submits therefore that the District Court did not first obtain jurisdiction on April 19, 1933, because no bill or petition sufficient to confer that jurisdiction was on file in that Court on that day.

To treat such a sham pleading as a bill conferring jurisdiction would prevent another Court from acquir-

ing and exercising jurisdiction through the filing therein of a real bill presenting facts constituting a cause of action and conferring jurisdiction alleged by a vigilant state official moving immediately in the performance of a duty imposed by State law, or alleged by an interested individual alert to protect his rights.

The California statute under which appellant moved forward against appellee corporation almost coincidently with the action of the Delaware Court (Stats. Calif., 1919, p. 265; Stats. Calif., 1921, p. 1017; Act 3739 Deering's General Laws of Calif.) was before this Court in the case of

Lay v. Mitchell, 283 U. S. 864,

in which the Insurance Commissioner of California was appellee and certiorari was denied. Except as amended in 1931 (Stats. of Calif. for 1931, p. 2375), the statute as there set forth was in the same form on April 19, 1933. Those amendments were overlooked by the Appellate Court in its quotations therefrom in this case but the changes are not material here.

The purpose of the California statute to economically and expeditiously liquidate insolvent insurance companies through an administrative agency under Court supervision is now found in the laws of most of the States. It is discussed in connection with similar statutes of the States of New York and Illinois in the cases of

People v. Marquette National Fire Ins. Co., 184 N. E. 800, 808, and

In re Casualty Co. of America, 155 N. E. 735, 244 N. Y. 443,

the former quoting from a report made by the Governor of New York upon that subject in the year 1909 to the General Assembly of that State.

The signs of haste in the preparation of the petition for the appointment of ancillary receivers are otherwise manifest. The petition was verified on April 18, 1933, the day prior to the appointment of the primary receivers. (T. p. 7.) No claim is made by appellees of error in that behalf and presumably that was the true date of verification. On April 18, 1933, the executive committee of the directors of appellee corporation adopted a resolution authorizing the interposition of the corporation's answer to the petition for ancillary receivers filed in the District Court and authorizing acquiescence in the appointment of ancillary receiver. (T. p. 39.) When that alleged authorization was voted the Delaware Court had not determined the insolvency of appellee corporation and had not then acted upon the petition for the appointment of primary receivers therein pending.

The proof of a hurried ex parte application for friendly ancillary receivers, frowned upon by this Court in *Harkin v. Brundage,* supra, is unmistakably clear.

Exemplified copies of the Delaware bill and the Delaware Court order of course could not have been and were not annexed to the bill filed in the District Court for the appointment of ancillary receivers. The District Court could not ascertain from the bill before it on April 19, 1933, what facts were alleged in the Delaware bill and what findings were made in the Delaware Court order. That information was not

acquired by the District Court until the amendments to the bill were filed on April 25, 1933, six days subsequent to the filing of the proceeding instituted by the State of California. Nevertheless the District Court, acting without knowledge of the nature of the Delaware proceeding and in the absence of any showing why ancillary receivers should be appointed, made its ex parte order of appointment expressly predicating it upon the Delaware bill and the Delaware Court order. (T. p. 7.) Not having acquired jurisdiction by the filing of the skeleton bill the District Court had no jurisdiction to exercise, wherefore its order appointing ancillary receivers was a void act.

Closely in point, but not cited by the Appellate Court in this connection, is the decision of the Circuit Court of Appeals for the Third Circuit in the case of

Bluefields S. S. Co. v. Steele, 184 Fed. 584.

It involved an appeal from an order of a Federal Court appointing a receiver ancillary to a primary receiver also appointed by order of a Federal Court; appellant contended that the bill for the appointment of the ancillary receiver did not set forth the essential jurisdictional averments; the disclosures of that bill were exceedingly meager, and neither a copy of the bill nor a copy of the order in the primary receivership accompanied the bill for the appointment of the ancillary receiver. The Appellate Court said:

> "But the court whose aid is invoked must alone determine whether the case is a proper one for the appointment of an ancillary receiver. It cannot act intelligently, and therefore cannot tell what, in comity, it ought to do unless reasonable information has been communicated to it concern-

ing the object which it is requested to aid. It follows that a bill seeking the appointment of an ancillary receiver should disclose the nature of the proceeding in which the receiver was appointed in the court of primary jurisdiction. In the proceeding now before us no affidavits accompanied the bill of complaint except the affidavit of the complainant himself to the effect that he had read the bill, that its contents were true save as to the matters stated on information and belief, and that, as to those matters, he believed them to be true. No copy of the bill of complaint filed in the court of Louisiana, or of the order of that court appointing a receiver there, accompanied the bill filed here.

* * * * * * *

Whether the receiver in Louisiana was appointed because of the insolvency of the Bluefields Company, or for some other reason, we are left to conjecture.

* * * * * * *

The rule (comity) cannot be properly invoked where the essential jurisdictional averments are absent. In the bill before us there are no such averments as would justify the appointment of an ancillary receiver for the limited purpose mentioned in the order, or for any other purpose. While the judgments and decrees of other courts are entitled to full faith and credit, in this case the Circuit Court had before it no judgment or decree of the Louisiana court. It was given no information whatever as to the nature of the proceeding on which the primary receiver was appointed.

* * * * * * *

The bill is fatally defective in not setting forth facts sufficient to justify the appointment of an ancillary receiver."

The Delaware statute under which the primary receivers of appellee corporation were appointed by the Delaware State Court was before this Court in

Pusey & Jones v. Hansen, 261 U. S. 491.

Therein it was held that the Delaware statute authorized the appointment of primary receivers at the instance of a simple contract creditor (Sec. 3883, Revised Code of Del. for 1915); that the statute gave to the State Court the power but not the duty of appointing receivers; that the statute operated to confer upon such a creditor only a remedial right and not a substantive right; that the statute could not enlarge the jurisdiction of the Federal Court; and that the Federal Court could not appoint a receiver at the instance of such a creditor.

Applying that decision to this case it would seem clear that a bill of complaint not alleging that the complainant was a secured creditor, which was true of the bill here in question, would not have conferred jurisdiction upon a District Court in Delaware to appoint a primary receiver, and the necessary corollary would seem to be that a bill insufficient to confer upon a District Court jurisdiction to appoint a primary receiver would be insufficient to confer jurisdiction upon a District Court to appoint a receiver ancillary to a primary receiver appointed by a State Court.

THE AMENDMENTS FILED IN THE DISTRICT COURT ON APRIL 25, 1933, WERE NOT EFFECTIVE AS OF APRIL 19, 1933, THE DATE WHEN THE ORIGINAL BILL WAS THEREIN FILED.

The main point urged by appellant in the Appellate Court was that the original bill did not contain the matter essential to plead any cause of action or to confer jurisdiction upon the District Court as a Federal Court or as a Court of Equity.

The law distinguishes between a bill which pleads a cause of action imperfectly or defectively and a bill which pleads no cause of action at all. In the one case the subject matter of the bill, though inartificially put together, affords a basis for an amendment, but in the latter case there is nothing to which an amendment can relate or attach.

If an amendment does not state a new cause of action, particularly one founded upon facts occurring after the filing of the original bill, the amendment is deemed to relate back to the time of the filing of the original bill. If the amendment is the first or a new statement of a cause of action it dates from the time when it is filed, for in such a situation there is no cause of action already stated and filed to which the amendment can relate back. The cases cited by the Appellate Court on this phase of the appeal do not otherwise state the law—indeed, they appear to so state the law, and appellant now discusses them briefly.

In

Fleischmann Co. v. United States, 270 U. S. 349,

the original declaration, though defective, stated a cause of action, and this Court said that an amend-

ment curing the defects in the original declaration and not stating a new cause of action related back, by operation of law, to the date when the original declaration was filed.

Texas Cement Co. v. McCord, 233 U. S. 157, presented a situation where a suit was prematurely filed and thereafter an amended bill was filed. Of that situation this Court said that there was no cause of action in existence when the original bill was filed, that "there was no cause of action to amend", and that the amendment could not date back to the time of the filing of the original bill. This Court quoted from

American Bonding and Trust Co. v. Gibson County, 145 Fed. 871, 874,

as follows:

> "If no cause of action existed when the suit was started, there was nothing to amend * * *. It was not a case of a cause of action defectively stated. Such a defect is amendable."

Illinois Surety Co. v. Peeler, 240 U. S. 214, also dealt with an original bill defectively pleading but nevertheless pleading a cause of action subject to amendment relating back to the time of the filing of the original bill.

The Appellate Court quotes from

Columbia Valley R. Co. v. Portland & S. Ry. Co., 162 F. 603,

but that case does not treat of an original bill failing to state any cause of action. It is concerned with the filing of a new cause of action through an amended bill, and the Court held that the amended bill, because it stated a new cause of action, did not relate back to the time of the filing of the original bill.

Whether to apply the doctrine of relation back seems to depend not upon whether the additional matter is filed in the form of an amended bill or in the form of amendments to the original bill, which seemed important to the Appellate Court (T. p. 117), but upon the nature and substance of the original bill and the nature and substance of the additional matter without regard to the form in which the additional matter is presented.

Armstrong Cork Co. v. Merchants' Refrigerating Co., 184 Fed. 199,

also cited by the Appellate Court, involved an original bill which was held to state a good cause of action, wherefore the amendment was said to relate back. The same is true of

Hoover Co. v. Sesquicentennial Exposition Assn., 26 Fed. (2d) 821,

in which the Court had before it an original bill stating a cause of action with an "overfullness" which was the point of attack, and the Court said that the "amended bill", a superior product of pleading, spoke as of the date of the filing of the original bill.

The necessity of determining whether an original bill states, perfectly or imperfectly, some cause of action, in considering the application of the doctrine of relation back, also appears from the following authorities:

In

State v. Hackly, 50 So. 772,

it was said:

> "Unless a cause of action is alleged there is no suit and hence nothing to amend."

Tremont Lbr. Co. v. May, 78 So. 650,

declares:

"A petition which does not show a cause of action is one on which no judgment can be pronounced, and is, legally speaking, no petition, and hence cannot be amended. * * *

Where a cause of action is stated for the first time in a supplemental or amended petition, the filing of the supplemental petition must be considered to be the beginning of the suit. The suit must be considered as dating only from such filing, and not from the filing of the original petition; * * *"

In

Terzia v. The Grand Leader, 145 So. 363, 366,

it is said:

"But if it be conceded that an amendment to plaintiff's original petition, which, as we have stated, set out no cause of action, could have been allowed so as to sustain the action, the filing of the amendment would have been the beginning of a new suit which could take effect only from the date of its filing, and would not relate back to the date of filing of the original petition. The rule is stated as follows in 1 C. J. Sec. 413, p. 1159:

'An amended declaration or complaint which does not introduce a new cause of action relates back to the original commencement of the action, and cannot be considered as the beginning of a new action as of the date of the amendment; but where the amendment states a new cause of action, the action is not considered as commenced, as to the new cause until the amended declaration or

complaint is filed. So if the original complaint states a good cause of action, although defectively, an amendment amplifying such statement will relate back; but if no cause of action is stated in the original complaint, an amendment stating for the first time a good cause of action is equivalent to the commencement of a new action as of the date of the amendment.' "

The decisions of the Supreme Court of Louisiana in the *Tremont* and *Terzia* cases are approved and the principles therein announced applied in

Iberville Trust & Savings Bank v. City Cafe, 150 So. 95.

The Supreme Court of Georgia said in

Davis v. Muscogee Mfg. Co., 32 S. E. 30:

"An imperfect cause of action may be made perfect by a suitable amendment. No cause of action whatever cannot, by amendment, be converted into a cause of action."

The Davis decision is approved and followed in:

Hynes v. Evans, 105 S. E. 59:

Shephard v. So. Pine Co. of Ga., 45 S. E. 220;

Turner v. Plottel, 166 S. E. 31.

The rule was also voiced by the Supreme Court of Arkansas in

Arkansas Life Ins. Co. v. American National Life Ins. Co., 161 S. W. 136,

as follows:

"The complaint cannot be amended on motion to make more specific. It is not a statement of a cause of action defectively, but a failure to state a cause of action at all."

To the same effect is

Goodwin v. Robinson, 30 Ark. 436.

In

McCormick v. Kennedy, 56 S. W. (2d) 213,

the Supreme Court of Texas stated that

> "the basis of a plaintiff's cause of action cannot be left to be found in a supplemental petition."

From the cases cited by the Appellate Court in its opinion and from the additional authority hereby presented it seems clear that the Appellate Court should have determined whether the original bill stated a cause of action defectively or whether it failed to state any cause of action. If the original bill stated no cause of action, the amendments, whether they be deemed amendments to the original bill or an amended bill, dated, in legal effect, from the time of their filing and not from the time of the filing of the original bill. Therefore appellant submits that the Appellate Court erred in not deciding whether the original bill stated a cause of action and consequently conferred jurisdiction upon the District Court.

CONCLUSION.

It is therefore respectfully submitted (a) that this case is one calling for the exercise by this Court of its supervisory powers, to the end that the purpose of government to itself liquidate business affected with a public interest shall not be defeated by individuals racing into Court for a friendly, private receivership on a pretended bill of complaint designed to prevent

another Court from exercising jurisdiction which it has obtained at the instance of government diligently pursuing its purpose founded on a generally recognized need of avoiding waste and delay in such liquidation, and (b) that the writ of certiorari should be granted and the decision of the Circuit Court of Appeals reviewed and reversed.

Dated, San Francisco, California,
May 14, 1934.

FRANK L. GUERENA,
Attorney for Petitioner.